

FINDINGS OF FACT

The roles of the various respondents is unclear, although Dan Lohr appears to be involved in all of them. Mr. Lohr testified that he has an “interest” in Sohang Management, LLC (Sohang), a business incorporated in Texas. Sohang’s business is not well explained in the record. According to Mr. Lohr, an entity called 1109 Investments, Limited Partnership, owns Applewood Meadows, a mobile home park located in Hutchinson, Kansas, with Sohang owning a 1% interest in Applewood Meadows.

Mr. Lohr hired Trent Messmer to manage Applewood Meadows. When Mr. Messmer started working at Applewood Meadows in April 2007, three trailers were on site. Mr. Messmer maintained Applewood Meadows and collected the rent. He initially testified that his only compensation for managing Applewood Meadows was living rent-free in one of the company’s trailers starting in June 2007. He valued the rent as worth approximately \$350 to \$400 per month, while Mr. Lohr valued the rent at \$300 per month. Mr. Messmer was free to work elsewhere and actually worked for Roadrunner Driveaway, transporting buses across the country.

Mr. Lohr testified that Mr. Messmer proposed that if Sohang bought a truck, he would drive it to move mobile homes, or have someone drive it until he got the appropriate driver’s license. Mr. Lohr testified that he and Mr. Messmer informally agreed to split profits evenly from AAA Custom Mobile Home Movers, but due to start up costs, he asked Mr. Messmer to take less at the beginning. Mr. Messmer testified that he “subcontracted” through AAA Custom Mobile Home Movers and Sohang and was a manager.¹ The classification of AAA Custom Mobile Home Movers as a legal entity is unclear, as noted by Mr. Lohr’s testimony:

- Q. Is Triple A just a proprietorship, is it a corporation? Is it a joint venture between Sohang and Mr. Messmer, is it a partnership, what is it?
- A. Well, Triple AAA was started, you know, with Sohang’s investment in the truck and [Mr. Messmer’s] experience with moving mobile homes, so the profits were to be split for moving mobile homes.²

Mr. Messmer testified that AAA Custom Mobile Home Movers “is a truck that moves homes.”³ Sohang owned such truck. Whatever arrangement was made between Mr. Lohr and Mr. Messmer concerning AAA Custom Mobile Home Movers, it was only a loose, verbal agreement, with nothing in writing.

¹ P.H. Trans. (Apr. 3, 2008) at 37.

² *Id.* at 72-73.

³ Messmer Depo. at 13.

Mr. Messmer would sometimes move or “pull” mobile homes into Applewood Meadows. To get help in such endeavors, he would meet people, including claimant, for coffee in the morning, socialize, and tell such people that he had a mobile home to pull and that if they wanted to help, they could. Claimant was free to decline available work.

Mr. Messmer testified that he received 30% of the fee AAA Custom Mobile Home Movers charged for transporting mobile homes. He testified that respondent transported 18 mobile homes in 2007, but he only received a fee on four pulls, as the rest were free pulls to Applewood Meadows, as an incentive to populate the park and generate rent. AAA Custom Mobile Home Movers charged \$1,700 for the most expensive move. The other moves were for less money.

Claimant testified that Mr. Messmer hired him as a driver in March or April 2007 to pull mobile homes using a truck owned by Sohang. Claimant testified that he then “started work for Sohang Management and Mr. Messmer”⁴ as part of a crew consisting of himself, Mr. Messmer, Jim Richardson and Christina Richardson. The Richardsons did set up or ground work. Claimant did not know what the other people earned. Mr. Messmer indicated that with every pull, there were three employees: one driver and two people who set up the mobile home. The driver was paid \$100 cash and the set up crew were each paid \$30 cash a day.

Claimant asserted averaging six to eight pulls a month for \$100 per pull. Claimant agreed that between March and October 31, 2007, he and Ms. Messmer “contracted” off and on.⁵ Mr. Messmer characterized claimant as a subcontractor. Claimant would occasionally help set up mobile homes for \$30 each time, but such additional task and pay only came about one month or 90 days before his accident. He was paid by the job and taxes were his responsibility. Claimant had no documentation concerning the number of pulls he performed in 2007 or what respondent paid him.

Of the mobile homes that were moved, Mr. Messmer testified claimant pulled nine of them. Mr. Messmer disagreed that claimant pulled six to eight mobile homes per month. When asked if he ever paid claimant \$30 to do ground crew work, Mr. Messmer indicated he paid claimant twice “[a]t the end.”⁶

On October 31, 2007, claimant was attempting to set a mobile home on a permanent foundation. The mobile home fell on him and he suffered significant injuries. Claimant was life-flighted to Larned Hospital and then flown to Wesley Medical Center. Dr. Gorecki operated on claimant’s back. Claimant spent eight to 10 days in the hospital.

⁴ P.H. Trans. (Apr. 3, 2008) at 12.

⁵ *Id.* at 26-27.

⁶ *Id.* at 49.

Administrative Law Judge Bruce Moore held a preliminary hearing on April 3, 2008. Claimant, Mr. Messmer and Mr. Lohr testified. According to Mr. Messmer, there were a total of eight mobile homes in Applewood Meadows when claimant was injured. Claimant agreed with Mr. Lohr that if claimant was pulling six to eight mobile homes a month, he would have moved 42 to 56 mobile homes in the seven months before the accident. When asked how he could have moved so many mobile homes when Applewood Meadows had so few mobile homes in the park, claimant testified that some mobile homes were moved to other locations. Claimant, citing post-accident memory issues, testified he could not say how many mobile homes were moved to locations other than Applewood Meadows.

Mr. Messmer's 2007 tax return was placed in evidence. Mr. Messmer testified that the tax return contained both his and his wife's income. Wages, salaries and tips totaled \$16,601. A loss of \$1,219 was reported from Mr. Messmer's self-employment or sole proprietorship as a driver. The tax return contained no earnings from respondents. The value of the free mobile home use was not listed in the tax return. Tax returns for Sohng Management, LLC, for tax years 2006 and 2007, were placed into evidence. Such tax returns listed no money, salaries or wages paid to officers or employees.

Judge Moore's May 12, 2008 preliminary hearing Order indicated claimant failed to prove that respondent had, or was reasonably expected to have, an annual payroll that would subject it to the provisions of the Kansas Workers Compensation Act.

At some unknown time in 2009, claimant, as a plaintiff, brought a civil case in Pawnee County against Dan Lohr, AAA Custom Mobile Home Movers, Trent Messmer, Sohng Management, LLC, 1109 Investments, LP, Chris Graham and Affordable Homes.

On January 13, 2012, this claim was transferred to Administrative Law Judge John D. Clark.

In 2012, claimant took Mr. Messmer's deposition. Contrary to his prior testimony, Mr. Messmer testified he was also paid \$654 or "something like that" every two weeks.⁷ He testified that such pay only started when he moved into the trailer park in June 2007.⁸ He explained that he did not previously mention this additional compensation at the 2008 preliminary hearing because Mr. Lohr threatened his job. Mr. Messmer testified that Mr. Lohr accused him of embezzlement, fired him and evicted him from the mobile home about one week after the 2008 preliminary hearing.

While Mr. Messmer previously testified in 2008 that he was paid a 30% share of moving fees, he testified in 2012 that he did not know what percentage he was paid,

⁷ Messmer Depo. at 22, 26.

⁸ *Id.* at 79.

perhaps 10% to 20%. Mr. Messmer could also not recall testifying in 2008 that drivers made \$100 and ground crew members earned \$30. He testified that he did not know what the driver or the ground crew people would be paid.

Mr. Messmer acknowledged that he did not report any payments from Mr. Lohr on his taxes. He testified that he “got nailed” by the IRS and had to pay \$8,000 in back taxes, either for work he did for Mr. Lohr or maybe for work he did for Roadrunner Driveaway.⁹

Mr. Messmer testified that he did not own any businesses with Mr. Lohr and denied that they were ever business partners. Mr. Messmer characterized himself as an “employee, subcontractor.”¹⁰ Mr. Messmer testified that Mr. Lohr paid three other employees \$10 per hour. Mr. Messmer testified that a number of other people labored to set up the mobile home park, such as water and electrical work.¹¹

Mr. Messmer testified that the AAA Custom Mobile Home Movers truck was used to pull mobile homes on 13 occasions in 2007, with a driver named Mr. Narron driving the truck five times and claimant being the driver the other eight occasions. At the time of claimant’s accident, Mr. Messmer estimated Applewood Meadows generated \$1,675 per month (two rentals at \$400/month and five lots leased at \$175/month).

Mr. Messmer testified he was the only account holder on a bank account that had been set up for him by Mr. Lohr. He indicated Mr. Lohr would deposit his wages into this account as well as funds to cover the cost of business expenses. Mr. Messmer would also deposit and comingle into this account earnings he received from Roadrunner Driveaway. The bank statement from this account reflected transfers in 2007 totaling \$45,604.86 and cash withdrawals of \$30,805.50. Mr. Messmer testified that he was the only person who made any withdrawals. While questioned extensively regarding large deposits and withdrawals, Mr. Messmer was unable to recall the purpose for most of the transactions, including why money was withdrawn or how it was used.¹² He agreed that, other than his testimony, he could not point to bank records and prove that Mr. Lohr deposited money into such account to pay the \$654 in wages every two weeks.¹³

⁹ *Id.* at 63-64.

¹⁰ *Id.* at 22.

¹¹ Much work had to be done following an explosion at the mobile home park several years earlier. These other people appear to be contractors who reestablished the trailer park's infrastructure.

¹² E.g., Messmer Depo. at 70-72, 80, 81, 98-101.

¹³ *Id.* at 72, 122.

Judge Clark ruled in his March 18, 2013 preliminary hearing Order that respondent's total annual payroll was \$18,060, and therefore, the parties were not covered by the Kansas Workers Compensation Act.

PRINCIPLES OF LAW

K.S.A. 44-505(a) states in part:

Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:

. . .

(2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection.

ANALYSIS

Claimant did not establish his burden of proving, more probably than not, that respondent's payroll was in excess of \$20,000.

Mr. Messmer's testimony is highly dubious. He contended that he did not tell the truth at the 2008 preliminary hearing when he limited his income from Mr. Lohr to having lived rent free in a trailer provided by respondent, under threat that he would be fired unless he lied under oath. If Mr. Messmer concealed such income, he did so more frequently than just at the 2008 preliminary hearing, insofar as he did not report such income to the Internal Revenue Service. Quite frankly, there is no reason to believe Mr. Messmer's testimony. As noted by the Fund, Mr. Messmer understood that he would not face liability stemming from claimant's civil case in Pawnee County if the case were compensable under the Kansas Workers Compensation Act. While Mr. Messmer bemoaned that he had not even a "pot to pee in,"¹⁴ the Fund's point is well-taken: Mr. Messmer had reason to alter his sworn testimony.

¹⁴ *Id.* at 66.

Claimant's testimony that he moved six to eight mobile homes per month is not credible. The evidence shows that he moved eight mobile homes in 2007.

Claimant failed to prove respondent had a \$20,000 payroll. This Board Member disagrees with Judge Clark's use of 40 weeks for Mr. Messmer's alleged period of employment with respondent in 2007. Mr. Messmer testified that he only started getting pay every two weeks when he started getting free rent in June 2007. From June 1 through December 31, 2007, a period of 30.57 weeks passed. The 2007 payroll, even if Mr. Messmer's dubious testimony is believed is noted in the chart below.

Person	Pay
Claimant	\$ 800.00 for eight pulls at \$100 each \$ 60.00 for working ground crew twice \$ 860.00
Mr. Narron	\$ 500.00 for five pulls at \$100 each
Jim and Christina Richardson	\$ 780.00 for ground crew work 13 times at \$30 each
Mr. Messmer	\$ 9,996.39 for 30.57 weeks of alleged pay of \$327 per week \$ 2,800.00 for \$400 in free rent for seven months \$ 900.00 for 30% of \$3,000 in moving fees \$13,696.90

The total of \$860, \$500, \$780 and \$13,696.90 is \$15,836.39. This figure requires that this Board Member believes Mr. Messmer's testimony regarding wages. As noted above, this Board Member does not believe Mr. Messmer's testimony. Even if this Board Member were to hypothetically adopt Judge Clark's finding that Mr. Messmer worked 40 weeks in 2007, the payroll still does not exceed \$20,000. Subtracting out the \$9,996.39 in purported wages to Mr. Messmer results in a total of \$5,840. There is also evidence that the value of Mr. Messmer's rent could have been as low as \$300 or \$350 per month.

CONCLUSIONS

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member affirms the result of Judge Clark's ruling: claimant did not prove a sufficient payroll for the Act to apply.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, the undersigned Board Member affirms Administrative Law Judge John D. Clark's March 18, 2013 Order.

IT IS SO ORDERED.

Dated this _____ day of June, 2013.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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¹⁵ K.S.A. 44-534a.